IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

77-386

JOHNNIE FLANNIGAN,

Petitioner

vs.

BENJAMIN F. BAILAR,
Postmaster General
of The United States,
et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

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I N D E X

TABLE OF AUTHORITIES CITED

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The petitioner, Johnnie Flannigan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of The United States Court of Appeals for the Ninth Circuit, entered in this proceeding on May 6, 1977.

OPINION BELOW

The opinion of The Court of Appeals, an unreported opinion, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 6, 1977, and this Court's jurisdiction is invoked under 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Whether the Petitioner is a victim of discriminatory law enforcement, in that, the Post Master General of The United States granted amnesty to all offenders of mail falsification, except three employees in the San Francisco Post Office.

2. Whether an illegal confession; some inconclusive statistical data; and testimonial evidence a great portion of which was opinion and hearsay, given by a biased witness constitutes substantial evidence.

STATEMENT OF THE CASE

On or about June 24, 1974, the Petitioner received a letter from Lim P. Lee, Post Master of The San Francisco Post Office which notified him (Petitioner) that he was being removed from his position as a Foreman of Mails in the San Francisco Post Office, effective July 8, 1974. The basis for the removal was the charge "that petitioner had caused mail production records to be falsified and inflated." Petitioner's discharge

was duly appealed in the United States Civil Service Commission, and Judicial Review was brought in The United States District Court for the Northern District of California and The United States Court of Appeals for the Ninth Circuit.

The decision to terminate Petitioner's employment was sustained by the Civil Service Commission, The District Court and The Court of Appeals.

ARGUMENT

I. THE TERMINATION OF PETITIONER'S EMPLOYMENT WAS SELECTIVE ENFORCEMENT OF LAW.

At the time the petitioner was discharged from employment, the United States Post Master General admitted that the practice of falsifying mail production records was widespread throughout the United States, and that because the practice was so widespread he would not impose any sanctions on past offenders. However, in spite of the unqualified expressed policy of amnesty, three employees (including petitioner) in the San Francisco, California, Post Office were discharged on this ground.

It is a well-established principle that selective prosecution is repugnant to equal protection of laws, Yick Wo v. Hopkins, 118 U.S. 356 (1886), and the rule is applicable against the Federal Government under the due process of law clause of the Fifth Amendment, Bolling-v. Sharp, 347 U.S. 497 (1954). Recent cases have amplified the prohibition against selective prosecution, for example,

in Furman v. Georgia, 408 U.S. 238 (1972) selective application was one of the grounds for outlawing capital punishment; in United States v. Falk, 479 F.2d 616, (7th Cir. 1973) selective prosecution was the basis for reversing a conviction for the refusal of a defendant to submit to induction into the armed forces and the failure to possess a draft card.

In U.S. v. Falk, supra, the defendant raised a prima facie case by proving that he was singled out for prosecution because he had resisted induction into the armed forces, and had failed to keep a draft card in his possession; whereas, numerous other persons were obviously guilty of the same offense who were not prosecuted. The prima facie showing of discrimination shifted the burden of proving justification of the selectivity to the government. U.S. v. Falk, supra, 479 F.2d at 421.

In U. S. v. Falk, supra, 479 F.2d at 621, Lt. General Hershey, Director of The Selective Service System issued a policy statement which purported to grant amnesty to offenders of the draft regulations; nevertheless, the defendant therein was the subject of prosecution, apparently, only because he had counseled other persons to resist the draft. In a policy statement similar to that of General Hershey's, Benjamin F. Bailar, The United States Post Master General, a respondent herein, issued his promise of amnesty. In each instance, the unqualified and unrestricted policy was discriminatorily applied by administrators. And in U.S. v. Falk, supra, even though Falk's offense was different from and had a greater impact in the draft resistance movement than the offenses of the average offender, he, nevertheless, could not be selectively prosecuted.

In the present case, no evidence was presented which distinguished petitioner and the two other supervisors in San Francisco from all of the other persons throughout the United States who obviously had perpetrated the same infraction of inflating mail volume reports. Thus, if Falk could not be selectively prosecuted even though his offense may perhaps have been more flagrant than other offenders, by the same logic the petitioner could not be discharged from employment in the Post Office when all of the other offenders were merely reprimanded.

II. THE DISMISSAL OF PETITIONER WAS ARBITRARY AND CAPRICIOUS AS THE DECISION TO DISMISS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The main items of evidence which were used to sustain petitioner's dismissal were the testimony of witness Dorothy Dominquez, the alleged confession which petitioner asserts was involuntary, and some statistical data introduced by the Postal Service. These items of evidence will be discussed below.

A. STATISTICAL DATA

Certain statistical data was drawn up especially for the hearing by an Inspector Johns to reflect mail production volumes, and ultimately to prove that petitioner was falsifying the production count.

These items were received in evidence and was one of the bases for the decisions of the Field Office and the Review Board. This evidence was received without any foundation or satisfaction of the rule of conditional relevancy, see Federal Evidence Code 104 (b), and 402.

In the present case witness Johns testified that the statistical data was prepared for the hearing on petitioner's appeal, therefore, it seems that this evidence is analogous to pre-trial experiments. On the issue of experimental test, it is fundamental that the admissibility of experimental test depends upon a foundational showing of substantial similarity between the test conducted and the actual conditions in question, Ramseyer v. General Motors Corp., C.A. Neb (1969) 417 F.2d 859; Crown Cork & Seal, Co. v. Morton Pharmaceutical, Inc., C.A. Tenn. (1969) 417 F.2d 921.

Petitioner submits that without the foundational showing of similarity of conditions in the sphere of his operations in the Post Office in 1973 to those in 1974, the said statistical data is without probative value.

As an independent ground for excluding the evidence of statistical data is that it is a product of the illegal confession, and is therefore excludable under the "fruit of the poisonous tree doctrine," Wong Sun v. U.S., 371 U.S. 471 (1963).

B. PETITIONER'S ALLEGED CONFESSION

The alleged confession was one of the items of evidence which was the basis for the dismissal. This alleged confession has all of the earmarks of an involuntary and coerced confession, and, in addition, it was acquired in violation of petitioner's Sixth Amendment Right to Counsel.

At the outset the period of interrogation is a factor which indicates coercion. The interrogation lasted for approximately two hours, and the alleged confession was

not signed until near the end of the encounter at 2:40 a.m. In, Blackburn v. Alabama, 361 U.S. 199 at 206 (1960, the Court held that, "A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror."

In Spano v. People of New York, 360 U.S. 315 at 320-321, 79 S.Ct. at 1205-1206, 3 L.Ed. 1265, the Court stated: "The abhorrence of society to the use of involuntary confession also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminal as from the accused criminal themselves."

This alleged confession patently violates petitioner's Fifth Amendment Privilege Against Self-Incrimination and his Sixth Amendment Right to Counsel. The investigating officers allege that they gave plaintiff the Miranda warning. However, by their own admission, they persevered with and coerced the petitioner to make the so-called confession, the colloquy which follows clearly proves this assertion, (Exhibit II: 93: 19-25):

> "Q. Do you have a recollection of what was said to him after the oral interview that caused him to write the statement?
>
> A. As far as the statement is concerned, Mr. Flannagan had continued to deny ever reweighing mail, so we wanted a statement of one sort or another." (emphasis added)

The significance of the sentence, "We wanted a statement of one sort or another," is that the investigators were coercing petitioner to waive his right to remain silent, and which is the first element of commonly called Miranda Warning, Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602. For the sake of clarity the Miranda Warning is as follows, 384 U.S. 444:

> "Prior to the questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (emphasis added)

And it is reiterated that the written confession came after more than two hours of continuous questioning by two investigators in a closed room, in the very early morning hours. It should be noted that the Hearing Officer observed that the interrogation had the atmosphere of a custodial situation.

The investigating officers breached another rule of Miranda v. Arizona, supra, when they continued to question appellant after he stated to them that he wanted to talk to his son and an attorney.

Miranda, 384 U.S. at 445, supra, is explicit, that if an accused requests an attorney the police must not question him.

Several recent California cases have dealt with the right of an accused to re-invoke his Fifth Amendment privilege

against self-incrimination after he has answered some question voluntarily. For example, in People v. Randal, 1 Cal.3d 956. The California Supreme Court held that a suspect's telephone call to his attorney in and of itself invoked the privilege; in People v. Burton, 6 Cal.3d 375, the same court held that a minor suspect's request to see one of his parents was a sufficient manifestation to assert the privilege; and in People v. Allegrezza (1977) Number 1 Comm. 14902 Cal. Ct. of Appeal 1st Appellate District. Division Four, in an unpublished opinion, a murder conviction was reversed, because a minor defendant had been subject to custodial interrogation and had confessed to the crime after he stated that he did not feel well and that he wished to go home.

In the present case, the petitioner attempted to invoke his privilege against self-incrimination by stating that he wanted to talk to his son who is a policeman or an attorney. However, in spite of the said request the inspectors continued their interrogation. The refusal to stop the interrogation violates the Miranda principle, as the Court stated 384 U.S. at 445, "Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question. The mere fact that he may have answered questions or volunteered some statements on his own does not deprive him of the rights to refrain from answering any further inquires until he has consulted with an attorney and thereafter consents to be questioned." In, People v. Randal, 1 Cal.3d at 956, supra, the California Supreme Court held that "Any words or conduct which 'reasonably appear inconsistent

with a present willingness on the part of the suspect to discuss his case freely and completely with police at that time must be held to amount to an invocation of his Fifth Amendment privilege."

The illegal confession herein is the major part of the evidence which was used against the petitioner to justify his discharge from employment in the Post Office. If their evidence had been suppressed or not considered by the Hearing Officer the agency could not satisfy the substantial evidence rule.

C. TESTIMONIAL EVIDENCE

Dorothy M. Dominguez was called as a witness, an analysis reveals that Ms. Dominguez's testimony disclosed nothing more than her suspicion and accusations.

In the first place, she was not qualified as an expert witness. And at no time during her appearance as a witness was any evidence entered to show what was proper procedure for weighing mail. In fact, she relied on the hearsay statements of one, Mr. Najak, for the proper procedure, and, Mr. Najak's specific utterance was not stated. Her testimony is replete with inferences and opinion that petitioner was re-weighing mail, her main accusations are that he did something unusual by pushing the cart from an area and back to the area from where he started, and that he had his foot on the scale while weighing a dolly of mail.

The petitioner explained these accusations that he had withdrawn improperly classified mail and re-weighed it, and his reply to the incident of having his foot on the scale was that a weight master had called his attention to the fact that he had his foot on the scale.

Mrs. Dominguez's testimony and opinions were contradicted and refuted by the stipulated testimony of Assistant Tour Superintendent, Mildred Burns, that in late January and February 1975, she observed the petitioner's performance in

the post office for two months, and that she did not see him re-weighing mail. In addition, the re-weighing of incorrectly classified mail was explained by the Government's own witness, Gaylord Jenkins, who explained in essence that occasionally there would be a conference between a Mr. David Gee, a tour superintendent, and petitioner, and that when the conferences ended he (Mr. Jenkins) would be instructed to withdraw the mail from one operation and put into another.

The Hearing Officer and the Appeals Review Board, seem to have entirely disregarded Ms. Dominguez's possible bias against petitioner. Petitioner testified that on numerous occasions he had to verbally reprimand her on several occasions for her use of abusive and obscene language to employees.

Substantial evidence has been defined as "more than a scintilla and must do more than create a suspicion of existence of fact to be established, it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, N.L.R.B. v. Arkansas Grain Corp., (C.A. Ark. 1968) 392 F.2d 161. As applied to the present case, the statistical data of dubious probative value and the testimonial evidence which was replete with opinion, conclusions and hearsay and the illegal confession do not satisfy the requirements of the standard for substantial evidence.

CONCLUSION

The order of dismissal could be vacated and/or reversed on either of the grounds set out herein. However, considering all of the grounds in their cumulative impact, it seems to be compelling that the order of dismissal be vacated and set aside.

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

CECIL L. McGRIFF

Cecil L. McGriff

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNIE FLANNIGAN, Plaintiff-Appellant, vs. BENJAMIN F. BAILAR, Post Master General of the United States; ROBERT E. HAMPTON, Chairman, United States Civil Service Commission, et al., Defendants-Appellees.	)	No. 76-1734 MEMORANDUM

[April 13, 1977]
Appeal from the United States
District Court for the
Northern District of California

Before: WRIGHT, KILKENNY and ANDERSON, Circuit Judges.

We affirm the granting of summary judgment for defendants and dismissal of the appellant's complaint which sought to vacate his discharge for cause from the postal service and reinstatement.

Our scope of review is limited. We inquire only whether applicable procedures were complied with and whether the dismissal was

arbitrary and capricious. Alsbury v. U.S. Postal Service, 530 F.2d 852, 853 (9th Cir.), cert. denied. _____ U.S. _____, 97 S.Ct. 85 (1976). Our review of the administrative record shows that plaintiff's contentions were given careful and fair consideration by the Civil Service Commission and its San Francisco field office. The Alsbury standard has been met. We cannot accept his argument that, under the circumstances, dismissal was cruel and unusual punishment. Nor was there selective enforcement.

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that three copies of the foregoing Petition for Writ of Certiorari was mailed on Sept. 9, 1977 to the following:

Solicitor General of the United States
5614 Department of Justice
Washington, D.C. 20530

Dated: Sept. 9, 1977

CECIL L. McGRIFF

Cecil L. McGriff